Eddie Low (Chairman of the Badan Khairat Kematian Penduduk Bandar Wangsa Maju Setapak Kuala Lumpur) v Datuk Bandar Kuala Lumpur

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-750–12 OF 2019
YAACOB MD SAM, RAVINTHRAN AND GHAZALI CHA JJCA
22 SEPTEMBER 2022

Administrative law — Judicial review — Funeral parlour — Decision to prohibit the interring of ashes in proposed columbarium project — Whether there was unlawful revocation of development order — Whether there was consent and knowledge of the prohibition — Whether columbarium could solve problem of shortage of burial grounds — Whether allegation of forgery was considered — Whether appellant had legitimate expectation that interring ashes would be permitted — Whether there were two versions of development order — Whether there were niches for interring ashes in the building plan — Whether undertaking was misconstrued — Whether prohibition was mala fide and unreasonable — Federal Territory (Planning) Act 1982 s 24 — Street, Drainage and Building Act 1974 s 70(18)

This was an appeal against the decision of the High Court which dismissed a judicial review application. The appellant had applied to quash the decision of the respondent to prohibit the interring of ashes in a proposed project. The appellant was the owner of a parcel of land in Wangsa Maju. The condition of land use endorsed on the title was that it was to be used as a funeral parlour only. However, in October 2013, the appellant applied to the respondent for approval of a development plan for a project known as 'Cadangan Membina Rumah Pengurusan Mayat Memorial Shi Qin Tan 4 Tingkat'. On 18 November 2013, the appellant wrote to the respondent to say that ashes would be interred in the proposed facility. Thus, this was a columbarium project at inception and not merely a funeral parlour project. The application was approved via letter issued on 17 November 2014 by the respondent. This approval was known as Development Order 2014 ('DO 2014'). It permitted the interring of ashes as stated in Condition 18. However, the respondent delayed approving the building plan for the columbarium to be built and later put the approval on hold pending referral to a post Cabinet meeting. The appellant alleged that the respondent approved another Development Order in 2016 ('DO 2016') on 25 April 2016 although no application was made. In DO 2016, a new Condition No 6 was imposed. It prohibited cremation but it did not prohibit the internment of ashes. The appellant averred that he had no knowledge that in the respondent's copy of DO 2016, Condition No 6

contained a prohibition on the internment of ashes. On 23 June 2016, the respondent wrote to the appellant and noted that the appellant had agreed not to inter ashes via letter dated 7 December 2015. The respondent wrote another letter on 15 August 2016 requesting an undertaking from the appellant that Condition 6 that prohibited the interring of ashes be complied with. But the appellant later lodged a police report and said that the letter dated 7 December 2015 agreeing to Condition No 6 was a forgery. The appellant filed an appeal to the respondent via letter dated 26 September 2017 to revoke Condition No 6 of DO 2016 and replace it with Condition No 18 of DO 2014. The appeal was rejected on 8 November 2017 on the ground that the residents in the vicinity of the project site objected to the proposed columbarium. A second appeal was made to the respondent on 6 June 2018. That too was rejected. A third appeal was made via letter dated 27 July 2018 and the respondent did not reply to this letter. When legal notices issued to the respondent did not elicit a favourable reply, the appellant filed a judicial review application on 19 December 2018. The High Court however, dismissed the judicial review application. Hence, this appeal. The issues before the appellate court were: (a) whether there was unlawful revocation of the development order; (b) whether there was consent and knowledge on the part of the appellant for the imposition of Condition 6 that barred interring of ashes; (c) whether the columbarium could solve the problem of shortage of burial grounds; (d) whether the High Court judge had considered the forgery allegation; (e) whether the appellant had a legitimate expectation that DO 2016 would permit interring of ashes; (f) whether there were two versions of DO 2016; (g) whether the HCJ had considered that there were niches for interring ashes in the building plan; (h) whether the appellant's undertaking was misconstrued; and (i) whether Condition 6 was mala fide and unreasonable.

Held, dismissing the appeal with no order as to costs:

(1) Section 24 of the Federal Territory (Planning) Act 1982 stipulates that a development order unless extended was only valid for 12 months and that development should commence or that the building plan should be submitted. In the instant case, due to objection of the local residents, the respondent had informed the appellant of the postponement of the approval of the building plan. In the premises, the DO 2014 expired after twelve months. The issue of unlawful revocation of DO 2014 by the respondent could not arise in the premises. It also followed that the conditions of DO 2014 were not immutable and there was no legal impediment for the respondent as the local authority to reconsider and impose new conditions in a subsequent development order or building plan (see paras 23–24).

(2) There was no allegation of forgery about the signature of the principal submitting person in the application for the construction of a funeral parlour, thus the learned HCJ was not wrong to reject the claim of the

appellant that they did not consent to Condition 6. In the premises, the learned HCJ correctly found that the objection of the local residents was not the sole reason that the Condition 6 was imposed in DO 2016 despite the appeals of the respondent to waive it. The appellant had knowledge from December 2014 onwards that the construction of a columbarium was not approved and had through the architect re-applied for approval of a building plan for a funeral parlour on 4 April 2016 with the new title 'Pusat Pengurusan Mayat' instead of 'Pusat Penyimpanan Abu Mayat atau Columbarium' (see paras 28–29).

(3) The ground that the columbarium project would solve the problem of shortage of burial grounds was never raised in the High Court, as pointed out by counsel for the respondent. In the premises, there was no reason why the objection of the local residents including the residents of condominiums around the proposed columbarium was not a relevant factor in the decision of the respondent (see para 31).

(4) The learned HCJ was mindful of the forgery allegation but was of the considered view that the appellant was aware of Condition 6 and had consented to it because of subsequent applications by the appellant for the construction of a funeral parlour including the formal application by its architect on 4 April 2016 (see para 32).

(5) The court was of the view that the argument that the appellant had a legitimate expectation that DO 2016 would permit interring of ashes was also without merit as found by the learned HCJ. The building plan pursuant to DO 2014 for a columbarium was put on hold indefinitely due to objection of the local residents. The appellant could have appealed against the refusal of the respondent to approve the building plan to the State Authority after three months under s 70(18) of the Street, Drainage and Building Act 1974. The appellant did not do so. Instead, another building plan application was submitted for the construction of a funeral parlour instead of a columbarium on 4 April 2016 by the architect of the appellant. Therefore, the question of legitimate expectation in respect of permission to construct a columbarium could not arise after that date (see paras 33–34).

(6) The court found that the learned HCJ had correctly dismissed the claim of the appellant that there were two versions of DO 2016, ie, their version did not contain Condition 6. The appellant's architect had submitted an application on 4 April 2016 to obtain approval for the construction of a 'funeral parlour'. In subsequent letters, the respondent mentioned Condition 6 that barred internment of ashes. There was no protest from the appellant or their architect that such a prohibition was not stated in their version of DO 2016. In fact, in the letter of the respondent dated 11 October 2017, reference was made to Condition 6 that barred

interment of ashes. In the premises, the learned HCJ correctly rejected the claim that two versions of DO 2016 existed (see para 35).

(7) DO 2016 which was approved after the lapse of DO 2014 clearly barred internment of ashes. By that time, the appellant had knowledge and had consented to the construction of only a funeral parlour and not a columbarium. In the first building plan submitted pursuant to DO 2014, as pointed out by counsel for the respondent, the drawings of boxes were described as 'niches'. This plan was put on hold and was not approved. The subsequent building plan that was approved under DO 2014 did not specifically describe the boxes as niches for holding ashes. In the premises, it was not relevant that the appellant now claimed niches for interring ashes had been approved by the respondent. For this reason, there was no relevance of the sale of the niches to the public and the fact that 65% of the building had been completed. DO 2016 and all the relevant letters from January 2015 by the respondent clearly stated that internment of ashes would not be permitted (see para 36).

(8) Prior to the issuance of the letter dated 22 August 2016, the respondent had written to the appellant requesting compliance with DO 2016, particularly Condition 6, with the prohibition against interring of ashes spelt out. The appellant gave the undertaking in a letter dated 22 August 2016 to obtain approval of the building plan. Thus, the learned HCJ was not wrong to draw the conclusion that the appellant agreed to Condition 6. In the premises, the argument that the undertaking was wrongly taken into consideration had no merit (see paras 37–40).

(9) There was no evidence that the respondent had acted in bad faith towards the appellant and abused its position in imposing Condition 6 in DO 2016. It was imposed after taking into consideration the strong objection from local residents who did not want a columbarium in their midst. By that time, notice had been given that the building plan under DO 2014 had been put on hold due to objection of local residents and the appellant had been asked to re-submit the application. Condition 6 could not be said to be unreasonable either as the respondent as the local authority had a discretion to take into account the objection of the local residents in the matter of exercising its planning judgment. Therefore, the learned HCJ was not wrong in dismissing this ground (see para 41).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan semakan kehakiman. Perayu memohon untuk membatalkan keputusan responden untuk melarang penyimpanan abu mayat dalam projek yang dicadangkan. Perayu merupakan pemilik sebidang tanah di Wangsa Maju. Syarat penggunaan tanah di dalam hakmilik itu adalah tempat pengebumian sahaja. Bagaimanapun, pada Oktober 2013, perayu memohon

kepada responden untuk mendapatkan kelulusan pelan pembangunan bagi projek yang dikenali sebagai 'Cadangan Membina Rumah Pengurusan Mayat Memorial Shi Qin Tan 4 Tingkat'. Pada 18 November 2013, perayu menulis kepada responden untuk mengatakan bahawa abu mayat akan dimasukkan di kemudahan yang dicadangkan. Oleh itu, ini adalah projek columbarium pada permulaan dan bukan semata-mata projek tempat pengebumian. Permohonan itu diluluskan melalui surat yang dikeluarkan pada 17 November 2014 oleh responden. Kelulusan ini dikenali sebagai Perintah Pembangunan 2014 ('DO 2014'). Ia membenarkan penyimpanan abu mayat seperti yang dinyatakan dalam Syarat 18. Bagaimanapun, responden menangguhkan meluluskan pelan bangunan untuk columbarium dibina dan kelulusan itu ditangguhkan sementara menunggu mesyuarat pasca Kabinet. Perayu mendakwa responden meluluskan satu lagi Perintah Pembangunan pada 2016 ('DO 2016') pada 25 April 2016 walaupun tiada permohonan dibuat. Pada DO 2016, Syarat baru No 6 dikenakan. Ianya melarang pembakaran mayat tetapi ia tidak melarang penyimpanan abu mayat. Perayu menyatakan bahawa beliau tidak mempunyai pengetahuan bahawa di dalam DO 2016 responden, Syarat No 6 melarang penyimpanan abu mayat. Pada 23 Jun 2016, responden menulis surat kepada perayu dan menyatakan bahawa perayu telah bersetuju untuk tidak membuat penyimpanan abu mayat melalui surat bertarikh 7 Disember 2015. Responden menulis satu lagi surat pada 15 Ogos 2016 yang meminta aku janji daripada perayu bahawa Syarat 6 yang melarang penyimpanan abu mayat dipatuhi. Bagaimanapun, perayu kemudiannya membuat laporan polis dan mendakwa surat bertarikh 7 Disember 2015 berserta Syarat No 6 adalah dipalsukan. Perayu memfailkan rayuan kepada responden melalui surat bertarikh 26 September 2017 untuk membatalkan Syarat No 6 DO 2016 dan menggantikannya dengan Syarat No 18 DO 2014. Rayuan itu ditolak pada 8 November 2017 atas alasan penduduk di sekitar tapak projek membantah cadangan pembangunan columbarium itu. Rayuan kedua telah dibuat kepada responden pada 6 Jun 2018 dan ianya juga ditolak. Rayuan ketiga dibuat melalui surat bertarikh 27 Julai 2018 dan responden tidak membalas surat berkenaan. Apabila notis undang-undang yang dikeluarkan kepada responden tidak dijawab, perayu memfailkan permohonan semakan kehakiman pada 19 Disember 2018. Bagaimanapun, Mahkamah Tinggi menolak permohonan semakan kehakiman itu. Oleh itu, rayuan ini difailkan. Isu-isu di hadapan mahkamah rayuan adalah: (a) sama ada terdapat pembatalan perintah pembangunan yang menyalahi undang-undang; (b) sama ada terdapat persetujuan dan pengetahuan di pihak perayu bagi Syarat No 6 yang melarang penyimpanan abu mayat; (c) sama ada columbarium boleh menyelesaikan masalah kekurangan tanah perkuburan; (d) sama ada hakim Mahkamah Tinggi telah mempertimbangkan dakwaan pemalsuan dokumen tersebut; (e) sama ada perayu mempunyai jangkaan yang sah ('legitimate expectation') bahawa DO 2016 akan membenarkan penyimpanan abu mayat; (f) sama ada terdapat dua versi DO 2016; (g) sama ada HMT telah mempertimbangkan bahawa terdapat ruang untuk penyimpanan abu mayat di dalam pelan

bangunan; (h) sama ada aku janji perayu telah disalahtafsir; dan (i) sama ada Syarat No 6 mala fide dan tidak munasabah.

Diputuskan, menolak rayuan dengan tanpa perintah untuk kos:

(1) Seksyen 24 Akta (Perancangan) Wilayah Persekutuan 1982 menyatakan bahawa suatu perintah pembangunan hanya sah selama 12 bulan melainkan jika dilanjutkan dan pembangunan itu hendaklah dimulakan atau pelan bangunan hendaklah dihantar. Dalam kes ini, disebabkan bantahan penduduk setempat, responden telah memaklumkan kepada perayu mengenai penangguhan kelulusan pelan bangunan itu. Oleh itu, DO 2014 telah tamat tempoh selepas dua belas bulan. Isu pembatalan DO 2014 yang menyalahi undang-undang oleh responden tidak mungkin timbul atas alasan tersebut. Syarat-syarat DO 2014 tidak boleh diubah dan tiada halangan undang-undang bagi responden selaku pihak berkuasa tempatan untuk menimbang semula dan mengenakan syarat-syarat baru dalam perintah pembangunan atau pelan bangunan berikutnya (lihat perenggan 23–24).

(2) Tiada dakwaan pemalsuan tandatangan orang yang membuat permohonan pembinaan pusat pengebumian, oleh itu HMT tidak salah untuk menolak tuntutan perayu kerana mereka tidak bersetuju dengan Syarat No 6. Berdasarkan itu, HMT dengan betul mendapati bahawa bantahan penduduk tempatan bukanlah satu-satunya sebab Syarat No 6 dimasukkan ke dalam DO 2016 walaupun responden telah merayu untuk mengenepikannya. Perayu mempunyai pengetahuan dari Disember 2014 dan ketika pembinaan columbarium tersebut tidak diluluskan dan melalui permohonan semula kelulusan pelan bangunan oleh arkitek untuk pusat pengebumian pada 4 April 2016 dengan projek baru bertajuk 'Pusat Pengurusan Mayat', bukannya 'Pusat Penyimpanan Abu Mayat atau Columbarium' (lihat perenggan 28–29).

(3) Alasan bahawa projek columbarium akan menyelesaikan masalah kekurangan tanah perkuburan tidak pernah dibangkitkan di Mahkamah Tinggi, seperti yang dinyatakan oleh peguam bagi responden. Oleh itu, tiada sebab mengapa bantahan penduduk tempatan termasuk penghuni kondominium di sekitar columbarium yang dicadangkan bukanlah faktor yang relevan dalam keputusan responden (lihat perenggan 31).

(4) HMT mengambil maklum mengenai dakwaan pemalsuan itu tetapi berpandangan bahawa perayu mengetahui Syarat No 6 dan telah bersetuju dengannya kerana permohonan seterusnya oleh perayu dibuat untuk pembinaan pusat pengebumian termasuk permohonan oleh arkiteknya pada 4 April 2016 (lihat perenggan 32).

(5) Mahkamah berpandangan bahawa hujah bahawa perayu mempunyai jangkaan yang sah ('legitimate expectation') bahawa DO 2016 akan

membenarkan penyimpanan abu mayat juga tanpa merit seperti yang diputuskan oleh HMT. Pelan bangunan menurut DO 2014 untuk columbarium telah ditangguhkan kerana bantahan penduduk setempat. Perayu boleh merayu terhadap keengganan responden meluluskan pelan bangunan itu kepada Pihak Berkuasa Negeri selepas tiga bulan di bawah seksyen 70(18) Akta Jalan, Parit dan Bangunan 1974. Namun, perayu tidak berbuat demikian. Sebaliknya, satu lagi permohonan pelan bangunan telah dihantar untuk pembinaan pusat pengebumian dan bukannya columbarium pada 4 April 2016 oleh arkitek perayu. Oleh itu, persoalan jangkaan yang sah ('legitimate expectation') berkenaan dengan kebenaran untuk membina columbarium tidak boleh timbul selepas tarikh itu (lihat perenggan 33–34).

(6) Mahkamah ini mendapati HMT telah menolak tuntutan perayu dengan betul bahawa terdapat dua versi DO 2016, iaitu, versi mereka tidak mengandungi Syarat No 6. Arkitek perayu telah mengemukakan permohonan pada 4 April 2016 untuk mendapatkan kelulusan bagi pembinaan 'pusat pengebumian'. Dalam surat-surat berikutnya, responden menyebut Syarat No 6 yang menghalang penyimpanan abu mayat. Tiada bantahan daripada perayu atau arkiteknya bahawa larangan sedemikian tidak dinyatakan dalam versi DO 2016 mereka. Malah, dalam surat responden bertarikh 11 Oktober 2017, rujukan telah dibuat kepada Syarat No 6 yang melarang penyimpanan abu mayat. Oleh itu, HMT dengan betul menolak tuntutan bahawa dua versi DO 2016 wujud (lihat perenggan 35).

(7) DO 2016 yang telah diluluskan selepas tamat tempoh DO 2014 jelas melarang penyimpanan abu mayat. Pada masa itu, perayu mempunyai pengetahuan dan telah bersetuju dengan pembinaan pusat pengebumian sahaja dan bukannya columbarium. Dalam pelan bangunan pertama yang dihantar menurut DO 2014, seperti yang dinyatakan oleh peguam untuk responden, lukisan kotak digambarkan sebagai 'niches'. Pelan ini ditangguhkan dan tidak diluluskan. Pelan bangunan berikutnya yang telah diluluskan di bawah DO 2014 tidak secara khusus menggambarkan kotak sebagai niche untuk penyimpanan abu mayat. Oleh itu, adalah tidak relevan bahawa perayu kini mendakwa niche untuk penyimpanan abu mayat telah diluluskan oleh responden. Atas sebab ini, tiada kaitan penjualan niche kepada orang ramai dan bahawa bangunan telah siap sebanyak 65%. DO 2016 dan semua surat yang berkaitan dari Januari 2015 oleh responden dengan jelas menyatakan bahawa penyimpanan abu mayat tidak akan dibenarkan (lihat perenggan 36).

(8) Sebelum pengeluaran surat bertarikh 22 Ogos 2016, responden telah menulis surat kepada perayu untuk memastikan pematuhan terhadap DO 2016, terutamanya Syarat No 6 mengenai larangan penyimpanan abu mayat. Perayu memberi aku janji itu dalam surat bertarikh 22 Ogos

2016 untuk mendapatkan kelulusan pelan bangunan. Oleh itu, HMT tidak salah untuk membuat kesimpulan bahawa perayu bersetuju dengan Syarat No 6. Oleh itu, hujah bahawa aku janji itu disalahtafsir tidak mempunyai merit (lihat perenggan 37–40).

(9) Tiada bukti bahawa responden berniat jahat terhadap perayu dan menyalahgunakan kedudukannya dalam mengenakan Syarat No 6 di dalam DO 2016. Syarat tersebut dimasukkan mengambil kira bantahan keras daripada penduduk setempat yang tidak mahu columbarium dibina ditempat mereka. Pada masa itu, notis telah diberikan bahawa pelan bangunan di bawah DO 2014 telah ditangguhkan kerana bantahan penduduk tempatan dan perayu telah diminta untuk mengemukakan semula permohonan. Syarat No 6 tidak boleh dikatakan tidak munasabah kerana responden sebagai pihak berkuasa tempatan mempunyai budi bicara untuk mengambil kira bantahan penduduk setempat dalam melaksanakan perancangannya. Oleh itu, HMT tidak salah kerana menolak alasan ini (lihat perenggan 41).]

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (distd)

Legislation referred to

Federal Territory (Planning) Act 1982 s 24
Street, Drainage and Building Act 1974 s 70(18)

Appeal from: Judicial Review Application No WA-25–390–12 of 2018 (High Court, Kuala Lumpur)

Godfrey Thomas Fernandez (GT Fernandez & Co) for the appellant.
Jayananda Rao a/l Simmachalam (with Gayathri a/p Chandrakasan and Lim Woi Kang) (Rao & Kamal) for the respondent.

Ravinthran JCA:

[1] This is an appeal against the decision of the High Court which dismissed a judicial review application. The appellant is the Chairman of a registered society, namely the Badan Khairat Kematian Penduduk Wangsa Maju, Setapak, Kuala Lumpur ('Badan Khairat'). The judicial review application was instituted on behalf of the Badan Khairat. The Badan Khairat applied to quash the decision of the respondent to prohibit the interring of ashes in a proposed project. The respondent is the Datuk Bandar of Kuala Lumpur and the local authority empowered under the Federal Territory (Planning) Act 1982 to approve development plans. The respondent allowed the building in question to be used as a funeral parlour only and not as a columbarium

BACKGROUND FACTS

[2] The complaint of the appellant that culminated in the judicial review action arose in the following way.

[3] The appellant is the owner of a parcel of land in Wangsa Maju. The condition of land use endorsed on the title was that it was to be used as a funeral parlour only. However, in October of 2013, the appellant on behalf of the Badan Khairat applied to the respondent for approval of a development plan for a project known as 'Cadangan Membina Rumah Pengurusan Mayat Memorial Shi Qin Tan 4 Tingkat'. The application was submitted through its Consultant Architect, Tetuan CJ Koh Architect. On 18 November 2013, the Badan Khairat wrote to the respondent to say that ashes would be interred in the proposed facility. Thus, this was a columbarium project at inception and not merely a funeral parlour project.

[4] The application was approved via letter issued on 17 November 2014 by the respondent. This approval is referred to in the affidavit in support as Development Order 2014 ('DO 2014'). It permitted the interring of ashes as Condition 18 stated as follows:

> 18. Cadangan pembinaan pusat penyimpanan abu mayat (columbarium) ini adalah untuk simpanan abu mayat sahaja dan tidak dibenarkan sebarang aktviti pembakaran mayat dijalankan.

[5] However, the respondent delayed approving the building plan for the columbarium to be built. The appellant has alleged that one Datuk Yew Teong Look from the Malaysia Chinese Association ('MCA') met the Federal Territories Minister on 4 December 2014 and thereafter the respondent decided that only a funeral parlour would be approved and that a columbarium at the site in question would not be allowed. Subsequently, Datuk Yew Teong Look wrote to the Minister stating the objection of the residents in the area around the columbarium project site. In a letter dated 26 January 2015 addressed to the architect, the respondent said that the approval for the building plan had been put on hold pending referral to a Post Cabinet meeting.

[6] The appellant has alleged that the respondent approved another Development Order in 2016 ('DO 2016') on 25 April 2016 although no application was made. In DO 2016, a new Condition No 6 was imposed. It prohibited cremation. But it did not prohibit the internment of ashes. The appellant averred that he had no knowledge that in the respondent's copy of DO 2016, Condition No 6 contained the following prohibition:

> Aktiviti penyimpanan abu mayat dalam bangunan ini tidak dibenarkan.

[7] On 23 June 2016, the respondent wrote to the appellant. In this letter, the respondent noted that the appellant had agreed not to inter ashes in via letter dated 7 December 2015. The respondent wrote another letter on 15 August 2016 requesting an undertaking from the appellant that Condition 6 that prohibits interring of ashes be complied with. But the appellant later lodged a police report and said that the letter dated 7 December 2015 agreeing to Condition No 6 was a forgery.

[8] On 27 September 2016, the respondent approved building plan for a four-storey funeral parlour on the site. The appellant instructed its joint venture partner, ie Condolite Development Sdn Bhd to commence construction of a columbarium and started to sell niches to hold ashes to the public. At the time of the judicial review action, 65 per cent of the project had been completed and 150 niches had been sold to the public. Constructions cost of RM4.8 million had been expended on the project.

[9] Meanwhile, the appellant filed an appeal to the respondent via letter dated 26 September 2017 to revoke Condition No 6 of DO 2016 and replace it with Condition No 18 of DO 2014. The appeal was rejected on 8 November 2017 on the ground that the residents in the vicinity of the project site objected to the proposed columbarium. A second appeal was made to the respondent on 6 June 2018. That too was rejected in a letter dated 18 July 2918. A third appeal was made via letter dated 27 July 2018. The respondent did not reply to this letter. When legal notices issued to the respondent did not elicit a favourable reply, the appellant filed a judicial review application on 19 December 2018.

JUDICIAL REVIEW APPLICATION

[10] In the judicial review application, the appellant sought the following reliefs:

(a) certiorari to quash Condition 6 in DO 206 that prohibited interring of ashes; and in the alternative;

(b) certiorari to quash DO 2016 and approval of building plan dated 29 September 2016;

(c) mandamus directing the respondent to approve building plan in accordance with DO 2014;

(d) consequential and ancillary costs of the application; and

(e) further reliefs.

DECISION OF HIGH COURT

[11] The learned High Court judge considered the following issues:

(a) whether the appellant applied for DO 2016;

(b) whether DO 2014 was revoked;

(c) whether the appellant agreed not to inter ashes via letter dated 7 December 2015;

(d) whether Condition 6 was mala fide, unreasonable and ultra vires; and

(e) whether appellant's copy of DO 2016 had a different version of Condition 6 which did not prohibit interring of ashes;

[12] The learned High Court judge held that the claim of the appellant that the Badan Khairat never applied for DO 2016 is an afterthought because in letter dated 22 February 2016, the appellant forwarded an application for approval of a building plan for a funeral parlour namely 'Cadangan Pembangunan 4 Tingkat Pusat Pengurusan Mayat Memorial Shi Qin Tang'. The approval of the plan was communicated to the architect of the appellant on 11 March 2016. Furthermore, the appellant had given an undertaking dated 22 August 2016 to comply with the conditions of DO 2016.

[13] In letter dated 7 December 2015, the Badan Khairat agreed not to inter ashes. The appellant claimed that the letter was a forgery. But the learned High Court judge noted that much later on 22 February 2016, the appellant forwarded an application for approval of a building plan for a funeral parlour only and had given an undertaking to comply with DO 2016. For this reason, the learned High Court judge held that the appellant was aware of the conditions of DO 2016 and was estopped from raising the same issue as their appeals to the respondent to waive Condition 6 had been dismissed.

[14] In respect of the argument that Condition 6 was mala fide, unreasonable and ultra vires, the learned High Court judge held that the respondent as the local authority can consider the objection of the residents in the area.

[15] In respect of the allegation that Condition 6 in the copy of DO 2016 that was given to the appellant did not prohibit interring of ashes, the learned High Court judge did not find merit in it. This is because much earlier in letter dated 21 November 2015, the respondent had informed the appellant that interring of ashes is not allowed and that site should only be used as funeral parlour. Furthermore, in letter dated 15 August 2016, the respondent requested and received an undertaking from the appellant to comply with the

terms of DO 2016 that prohibited interring of ashes. The copy of DO 2016 exhibited in the affidavit in reply of the respondent also states that interring of ashes is prohibited. Furthermore, by letter dated 26 September 2017, the appellant applied for exemption from Condition 6 which meant that he knew about the prohibition in question.

[16] Having answered all the above issues in favour of the respondent, the learned High Court judge dismissed the judicial review application.

ISSUES BEFORE US

[17] The main issues argued on behalf of the appellant may be summarized as follows:

(a) whether the High Court failed to consider whether there was evidence to support the claim that the local residents objected to the construction of a columbarium;

(b) whether political inference led to the imposition of Condition 6?

(c) whether objection from residents is a relevant factor;

(d) whether the respondent erred in considering objection from local residents after DO 2014 issued;

(e) whether the learned High Court judge failed to consider that the Columbarium project could solve the shortage of non-Muslim burial grounds in Wangsa Maju area?

(f) whether the approved building plan for DO 2016 included niches for interring ashes;

(g) whether there were two different versions of Condition 6;

(h) whether learned High Court judge ignored the police report about the forged letter from the Badan Khairat;

(i) whether the undertaking given by the appellant to the respondent was about cremation and not about interring of ashes; and

(j) whether the decision of the respondent was unreasonable.

[18] For sake of convenience, we shall group the related issues and discuss them under the following subheadings.

OBJECTION OF RESIDENTS

[19] The initial reason or one of the reasons given by the respondent for the imposition of Condition 6 in DO 2016 which prohibited internment of ashes

was that the residents in the surrounding area objected to the columbarium project. Counsel for the appellant submitted that evidence to support the existence of the objections from residents was not produced. We shall not deal with this issue at length. It is plainly without merit. Letters from the pro tem Committee of the Management Corporation of three condominiums in the area evidencing the collective objection of residents were exhibited. Furthermore, it was not wrong for the respondent to consider the letter of objection of Datuk Yew Teong Look from the MCA that stated that the residents objected to the project as he was a one-time Member of Parliament in the area and an active politician. Therefore, the submission that the respondent did not exhibit evidence of objection by the local residents is without basis.

[20] The next issue in respect of the objection from residents is whether the appellant's administrative decision to prohibit the interring of ashes was flawed because of political interference. In our opinion, the fact that Datuk Yew Teong Look was a politician does not necessarily render defective the respondent's decision to impose Condition 6 in DO 2016. As we said earlier, from the content of the letter that he had written, he was a mouthpiece who was articulating the dissatisfaction of the local residents who strongly objected to the construction of a columbarium. Therefore, it would make no difference whether Datuk Yew Teong Look was a political leader or a community leader. It is also relevant to note that two other objection letters by the pro tem committees of three nearby condominiums had also been received by the respondent. Thus, the objection of Datuk Yew Teong Look was not the only objection that was taken into consideration by the respondent.

[21] The respondent had stated in various letters that the objection of the local residents was one of the reasons that interring of ashes was prohibited. Thus, the next issue would be whether the objection of the local residents is a relevant factor in the decision of the respondent.

[22] Counsel for the appellant argued that the objection of the local residents should not have been taken into account on the ground that DO 2014 had already been approved by the respondent. We agree with the submission of counsel for the respondent that there is no merit in this ground as the said development order had already lapsed due to the fact that the building plan was not approved within 12 months. Paragraph 6 of DO 2014 states that it would lapse if approval for the building plan is not issued by the Jabatan Rekabentuk and Bangunan of the respondent within a year. It reads as follows:

> Perintah Pembangunan ini adalah sah selama satu tahun dari tarikh pengeluarannya melainkan jika Pelan Bangunan telah dikeluarkan oleh Jabatan Rekabentuk Bandar dan Bangunan, Dewan Bandaraya Kuala Lumpur melalui Urusetia Pusat Setempat (OSC), Jabatan Perancangan Bandar dalam tempoh tersebut. Jika gagal berbuat

demikan, kelulusan perancangan ini akan luput secara automatik. Pemohon dikehendaki melanjutkan Perintah Pembangunan sebelum tamat tempoh sah Perintah Pembangunan.

[23] Furthermore, s 24 of the Federal Territory (Planning) Act 1982 (Act 267) stipulates that a development order unless extended is only valid for 12 months and that development should commence or that the building plan should be submitted. The provision reads as follows:

> 24 Lapse of Development Order
>
> (1) A development order issued under this Act shall unless otherwise extended be valid for twelve months from the date of the issue of the order within which time the development shall commence in the manner specified in such order or the building plans in respect of the development shall be submitted in accordance with any law relating to the erection of buildings:
>
> Provided that this subsection shall not apply in respect of a development order which is expressly mentioned therein that the planning permission granted does not involve any building operation.
>
> (2) On an application being made in that behalf in the prescribed manner before the expiry of the period referred to in subsection (1) the Commissioner may on the payment of the prescribed fee by the applicant grant such extension or extensions to a development order as the Commissioner may deem fit.
>
> (3) In granting an extension or further extension of a development order under subsection (2), the Commissioner may impose such conditions on the development order as he thinks fit or vary the conditions originally imposed; and section 23 shall apply with the necessary modifications to the imposition or variation of conditions under this section as it applies to the imposition of conditions under subsection 22(2).

[24] In the instant case, due to objection of the local residents, the respondent had informed the appellant of the postponement of the approval of the building plan. In the premises, the DO 2014 expired after 12 months. The issue of unlawful revocation of DO 2014 by the respondent cannot arise in the premises. It also follows that the conditions of DO 2014 were not immutable and there was no legal impediment for the respondent as the local authority to reconsider and impose new conditions in a subsequent development order or building plan.

[25] In any event, as pointed out by counsel for the respondent, the objection of the local residents was not the sole reason for the imposition of Condition 6 by the respondent. We shall consider the other reason below.

KNOWLEDGE AND CONSENT

[26] We find it necessary to recapitulate some of the events that point to knowledge and acquiescence on the part of the appellant about the imposition of Condition 6 that barred interring of ashes. It is the case of the respondent that notwithstanding the issuance of DO 2014, as early as on 23 December 2014, the respondent's representatives had intimated in a meeting to the appellant that the Federal Territory Minister had suggested that the columbarium project be changed to a funeral parlour project. A month later on 26 January 2015, the respondent formally informed the appellant's architect (Tetuan CJ Koh Architect) in writing that the building plan for a columbarium had been postponed. Until almost the end of 2015, no letters on the project were exchanged between the appellant and the respondent. In November of that year, the respondent requested the architect of the appellant to submit an amended building plan that does not facilitate interring of ashes. Tetuan CJ Koh Architect who is also the Principal Submitting Person of the building plan was also informed by letter dated 24 November 2015 that interring of ashes is banned. The prohibition against interring of ashes was spelt out clearly in the following terms in the Malay Language:

> ... dengan memansuhkan aktiviti menyimpan abu mayat di dalam skim pembangunan ini ...

[27] Counsel for respondent also submitted that there was consent on the part of the appellant to amend the building plan because on 22 February 2016, the appellant submitted an application entitled 'Cadangan Pembangunan 4 Tingkat Pusat Pengurusan Mayat Memorial Shi Qin Tang'. Tetuan CJ Koh Architect, submitted a formal application on 4 April 2016 on behalf of the appellant with the same title. The appellant has alleged that the letter by the Badan Khairat to the respondent to indicate consent to Condition 6 was forged. But it is significant that there is no allegation of forgery about the signature of the Tetuan CJ Koh Architect who is the Principal Submitting Person in the building plan application dated 4 April 2016 on behalf of the Badan Khairat. There is also no allegation that the application was not made on the letterhead of Tetuan CJ Koh Architect. The following month, on 25 May 2016, the appellant issued DO 2016 which Condition 6 that prohibited interring of ashes. It is also significant to note that there was no reply to the letter of the respondent dated 23 June 2016 to the appellant. In that letter, the respondent said that complaints had been received from local residents about the sale of boxes for internment of ashes despite the agreement of the appellant in letter dated 7 December 2015 not to inter ashes. In the same letter the appellant was asked to comply with the Conditions of 2016. Assuming that the appellant had no knowledge about Condition 6 and had never agreed to it, in the ordinary course of things, there should have been a response from him. But the appellant did not reply to this letter.

[28] For the above reason and the reason that there is no allegation of forgery about the signature of the principal submitting person in the application of Tetuan CJ Koh Architect for the construction of a funeral parlour, we are of the view that the learned High Court judge was not wrong to reject the claim of the appellant that they did not consent to Condition 6.

[29] In the premises, the learned High Court judge correctly found that the objection of the local residents was not the sole reason that the Condition 6 was imposed in DO 2016 despite the appeals of the respondent to waive it. The appellant had knowledge from December of 2014 onwards that the construction of a columbarium was not approved and had through the Badan Khairat's architect re-applied for approval of a building plan for a funeral parlour on 4 April 2016 with the new title 'Pusat Pengurusan Mayat' instead of 'Pusat Penyimpanan Abu Mayat atau Columbarium'.

Whether columbarium can solve problem of shortage of burial grounds

[30] Counsel for the appellant cited the case of *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704 and argued that the columbarium project could solve the acute shortage of Chinese and non-Muslim burial grounds in Kuala Lumpur and in the Wangsa Maju area and that no consideration was given to this fact. Unlike in the instant case, in the above-mentioned case, the respondent approved the expansion of an existing Muslim cemetery near the appellant's condominium. The application to challenge the decision by some residents through a judicial review application was dismissed on several grounds. The court noted that the cemetery expansion project would solve the 'critical demand' for more Muslim burial grounds in Kuala Lumpur. But it was not the only reason for dismissal of the judicial review application. The court said that some of the residents purchased their units after expansion works on the cemetery had commenced. Furthermore, there was long delay in seeking relief.

[31] In the instant case however, the ground that the columbarium project would solve the problem of shortage of burial grounds was never raised in the High Court as pointed out by counsel for the respondent. The facts of the above-mentioned case are also distinguishable. The issue in *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur* was the expansion of a pre-existing cemetery that could solve the problem of critical shortage of Muslim burial grounds in Kuala Lumpur. In the instant case, there is no columbarium in existence in the area in question. In the premises, we see no reason why the objection of the local residents including the residents of condominiums around the proposed columbarium is not a relevant factor in the decision of the respondent.

Police report about forgery

[32] Counsel for the appellant submitted that the learned High Court judge ignored the police report about the letter in which consent was given by the Badan Khairat to refrain from interring ashes. We find no merit in the point taken. The learned High Court judge was mindful of the forgery allegation but Her Ladyship was of the considered view that the Badan Khairat was aware of Condition 6 and had consented to it because of subsequent applications by the Badan Khairat for the construction of a funeral parlour including the formal application by its architect on 4 April 2016.

Legitimate expectation

[33] We are of the view that the argument that the appellant had a legitimate expectation that DO 2016 would permit interring of ashes is also without merit as found by the learned High Court judge. As we pointed out earlier, the building plan pursuant to DO 2014 for a columbarium was put on hold indefinitely due to objection of the local residents. The appellant could have appealed against the refusal of the respondent to approve the building plan to the State Authority after three months under s 70(18) of the Street, Drainage and Building Act 1974 (Act 133). The provision reads as follows:

> If the local authority does not, within three calendar months from the date of the submission of any plans under subsection (2) or from the date of the resubmission of such plans amended pursuant to subsection (5), as the case may be, approve, disapprove or make written requisition with regard thereto, the principal submitting person or submitting person may apply to the State Authority, and the powers vested in the local authority under this section shall then vest in the State Authority.

[34] The appellant did not do so. But another building plan application was submitted for the construction of a funeral parlour instead of a columbarium on 4 April 2016 by the architect of the appellant. Therefore, the question of legitimate expectation in respect of permission to construct a columbarium cannot arise after that date.

Whether there were two versions of DO 2016?

[35] We find that the learned High Court judge correctly dismissed the claim of the appellant there were two versions of DO 2016, ie their version did not contain Condition 6. As we emphasised earlier, the appellant's architect had submitted an application on 4 April 2016 to obtain approval for the construction of a 'funeral parlour'. In subsequent letters, the respondent mentioned Condition 6 that barred internment of ashes. It is pertinent to note that there was no protest from the appellant or their architect that such a

prohibition was not stated in their version of DO 2016. In fact, in the letter of the respondent dated 11 October 2017, reference is made to Condition 6 that barred interment of ashes. In the premises, the learned High Court judge correctly rejected the claim that two versions of DO 2016 existed.

Niches in the building plan

[36] The appellant raised the point that the building plan was approved with niches or boxes for interring of ashes and this was not considered by the learned High Court judge. We see no merit in this point for the same reason given earlier. DO 2016 which was approved after the lapse of DO 2014 clearly barred internment of ashes. By that time, the appellant had knowledge and had consented to the construction of only a funeral parlour and not a columbarium. In the first building plan submitted pursuant to DO 2014, as pointed out by counsel for the respondent, the drawings of boxes were described as 'niches'. This plan was put on hold and was not approved. The subsequent building plan that was approved under DO 2014 did not specifically describe the boxes as niches for holding ashes. In the premises, it is not relevant that the appellant now claims niches for interring ashes had been approved by the respondent. For this reason, we fail to see the relevance of the sale of the niches to the public and the fact that 65% of the building had been completed. It bears repeating that DO 2016 and all the relevant letters from January of 2015 by the respondent clearly stated that internment of ashes would not be permitted.

Whether undertaking was misconstrued?

[37] Counsel for the appellant argued the High Court erroneously concluded that the appellant's letter dated 22 August 2016 was an undertaking not to inter ashes when in point of fact it was an undertaking not to carry out cremation activity. As we said earlier, prior to the issuance of letter dated 22 August 2016, the respondent wrote to the appellant to say that complaints had been received from local residents about the sale of boxes for internment of ashes by the latter. In the same letter the respondent requested compliance with the conditions of DO 2016. In the letter, the appellant is specifically asked to refrain from interring ashes. The relevant part of the letter reads as follows:

> Untuk makluman, Jabatan ini *telah menerima aduan dari aktiviti penjualan petak abu mayat bagi pembangunan ini*. Jabatan ini juga mengambil maklum bahawa pihak Badan Khairat Kematian Penduduk Bandar Wangsa Maju Setapak Kuala Lumpur melalui surat pengesahan dan persetujuan bertarikh 7.12.2015, *tidak akan menjalankan apa-apa aktiviti penyimpanan abu mayat di atas lot ini.*
>
> Sehubungan itu, pihak tuan dinasihatkan supaya segera menyelaraskan aktiviti ini mengikut syarat-syarat Perintah Pembangunan bertarikh 25.4.2016 untuk mengelakkan sebarang tindakan diambil kerana aktiviti yang dijalankan bercanggah dengan kelulusan. (Emphasis added.)

[38] In the next letter dated 15 August 2016, the respondent again requested for compliance with DO 2016, particularly Condition 6. Again, the prohibition against interring of ashes was spelt out. The relevant part of it reads as follows:

> Sukacita dimaklumkan bahawa pihak pemilik hendaklah mengemukakan surat akujanji kepada jabatan ini mengesahkan akan mematuhi syarat Perintah Pembangunan No 6, Lampiran 1, Rujukan no. (4) dlm.DBKL.JPRB.9175/2013 Jld 1 bertarikh 25.4.2016 iaitu *segala aktiviti penyimpanan abu mayat dalam bangunan ini adalah tidak dibenarkan.* (Emphasis added.)

[39] The appellant gave the following undertaking in letter dated 22 August 2016 to obtain approval of the building plan:

> Kami juga dengan ini memberi *AKUJANJI untuk mematuhi dan melaksanakan segala kehendak-kehendak Jabatan/Agensi Teknikal Luaran Dewan Bandaraya Kuala Lumpur seperti yang tertera di Lampiran 1 Perintah Pembangunan bertarikh 25 April 2016 tersebut.*
>
> Sekian, dan kami ucapkan terima kasih di atas segala sokongan dan kerjasama pihak tuan di dalam menjayakan permohonan kami seperti yang tersebut di atas dan berharap *tuan dapat meluluskan pelan pembangunan secepat mungkin.* (Emphasis added.)

[40] Thus, the learned High Court judge was not wrong to draw the conclusion that the appellant agreed to Condition 6. In the premises, the argument that the undertaking was wrongly taken into consideration has no merit.

Whether Condition 6 was mala fide and unreasonable?

[41] This ground of appeal is without merit. There is no evidence whatever that the respondent had acted in bad faith towards the appellant and abused its position in imposing Condition 6 in DO 2016. It was imposed after taking into consideration the strong objection from local residents who did not want a columbarium in their midst. By that time, notice had been given that the building plan under DO 2014 had been put on hold due to objection of local residents and the appellant had been asked to re-submit the application. Condition 6 cannot be said to be unreasonable either as the respondent as the local authority has discretion to take into account the objection of the local residents in the matter of exercising its planning judgment. Therefore, the learned High Court judge was not wrong in dismissing this ground.

CONCLUSION

[42] Having considered the issues raised by the appellant, we are of the view that the learned High Court judge had not erred in dismissing the judicial

review application as the act of the respondent in imposing Condition 6 to DO 2016 did not breach administrative law principles. Hence, the appeal is dismissed. No order as to costs.

Appeal dismissed with no order as to costs.

Reported by Muhamad Azham Marwan